



[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

Docket No. FAA-2012-0754

Airport Improvement Program (AIP): Policy Regarding Access to Airports From Residential Property

AGENCY: Federal Aviation Administration (FAA).

ACTION: Proposed policy; implementation of Section 136; opportunity to comment.

SUMMARY: This action proposes a policy, based on Federal law, concerning through-the-fence access to a federally-obligated airport from an adjacent or nearby property, when that property is used as a residence. This proposed policy limits application of the FAA's previously published interim policy (76 FR 15028; March 18, 2011) to commercial service airports that certified existing residential through-the-fence access agreements. In addition, this notice proposes to rescind applicability of the interim policy with regard to certain general aviation airports consistent with section 136 of Public Law 112-95 and describes how the FAA will interpret provisions of this law pertaining to residential through-the-fence access.

When the FAA adopted its interim policy on access to airports from residential property, the FAA announced its intent to initiate another policy review in 2014. This supplemental policy review will no longer be necessary.

**DATES:** Send your comments on or before [Insert date 30 days after date of publication in the Federal Register]. The FAA will consider comments on the proposed policy and its proposed implementation of Section 136 of Public Law 112-95. Any necessary or appropriate revisions resulting from the comments received will be adopted as of the date of a subsequent publication in the Federal Register.

**ADDRESSES:** You may send comments [identified by Docket Number FAA-2012-XXX] using any of the following methods:

- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- Mail: Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue, SE, Washington, DC 20590.
- Fax: 1-202-493-2251.
- Hand Delivery: To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the notice and comment process, see the SUPPLEMENTARY

INFORMATION section of this document.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. For more information, see the Privacy Act discussion in the SUPPLEMENTARY INFORMATION section of this document.

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Randall S. Fiertz, Director, Office of Airport Compliance and Management Analysis, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591, telephone (202) 267-3085; facsimile: (202) 267-5257.

#### SUPPLEMENTARY INFORMATION:

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association,

business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78).

#### Availability of Documents

You can get an electronic copy of this proposed policy and all other documents in this docket using the Internet by:

- (1) Searching the Federal eRulemaking portal (<http://www.regulations.gov/search>);
- (2) Visiting the FAA's Regulations and Policies Web page at [http://www.faa.gov/regulations\\_policies](http://www.faa.gov/regulations_policies); or
- (3) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/index.html>.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Airport Compliance and Management Analysis, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-3085. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

#### Authority for the Policy

This notice is published under the authority described in Subtitle VII, part B, chapter 471, section 47122 of title 49 United States Code.

## Background

On September 30, 2009, the FAA issued FAA Order 5190.6B, the Airport Compliance Manual. This order contains policy guidance for agency employees monitoring airport sponsor compliance with the grant assurances. Agency guidance that preceded Order 5190.6B discouraged through-the-fence access at airports with grant obligations, and Order 5190.6B contained specific objections to residential through-the-fence access based on more recent agency experiences. Order 5190.6B did not prescribe any specific actions to be taken by airport sponsors with residential through-the-fence access agreements and created ambiguity with regard to the future of these arrangements. The FAA accepted public comments on FAA Order 5190.6B after it was published. Comments received from interested airport sponsors, homeowners, and other parties urged the agency to reconsider its views on residential through-the-fence agreements.

In 2010, the FAA's Office of Airport Compliance initiated a policy review which included the review of written comments, meetings with state aviation officials, visits to airports with residential through-the-fence access, listening sessions with homeowners and homeowners' associations, and discussions with aviation membership associations. The FAA published a proposed revision in agency policy on residential through-the-fence access for public comment in September 2010 (75 FR 54946; September 9, 2010).

In March 2011, the FAA announced the adoption of an interim policy *Airport Improvement Program (AIP): Interim Policy Regarding Access to Airports From Residential Property* (76 FR 15028; March 18, 2011). The interim policy modified sponsor Grant Assurance 5, *Preserving*

*Rights and Powers*, to prohibit new residential through-the-fence access to a federally-obligated airport. The interim policy also required airport sponsors to certify their status with regard to the policy, depict existing access points on the airport layout plan, and develop access plans outlining how the airport sponsor meets certain standards related to the sponsor assurances. When the interim policy was adopted, the FAA announced its intent to initiate another policy review of residential through-the-fence access to federally-obligated airports in 2014.

Since adopting the interim policy, 125 federally-obligated airport sponsors have certified their status as having existing residential through-the-fence access agreements. The 125 locations include four commercial service airports, seven privately-owned reliever airports, and 114 general aviation airports.

On February 14, 2012, the FAA Modernization and Reform Act of 2012 (FMRA) was signed into law (P.L. 112-95). Section 136 of this law permits general aviation airports, as defined by the statute, to enter into residential through-the-fence agreements with property owners or associations representing property owners. This must be a written agreement that requires the property owner to:

- Pay access charges that the sponsor determines to be comparable to those fees charged to tenants and operators on-airport making similar use of the airport;
- Bear the cost of building and maintaining the infrastructure the sponsor determines is necessary to provide access to the airfield from property located adjacent to or near the airport;

- Maintain the property for residential, noncommercial use for the duration of the agreement;
- Prohibit access to the airport from other properties through the property of the property owner; and
- Prohibit any aircraft refueling from occurring on the property.

In order to implement this law, the FAA amended the sponsor assurances (77 FR 22376; April 13, 2012). Among the modifications, sponsor assurance 5(g) was redrafted to clarify that sponsors of commercial service airports are not permitted to enter into residential through-the-fence arrangements. However, sponsors of general aviation airports may enter into such an arrangement if the airport sponsor complies with the requirements of section 136 of P.L. 112-95 and the sponsor assurances. In addition, sponsor assurance 29, *Airport Layout Plan*, was amended to require all proposed and existing access points used to taxi aircraft across the airport property boundary be depicted on the airport layout plan (ALP).

A complete list of the current grant assurances can be viewed at:

[http://www.faa.gov/airports/aip/grant\\_assurances/](http://www.faa.gov/airports/aip/grant_assurances/)

The FAA is proposing its interpretation of the FMRA's section 136 and seeks public comment on this interpretation. In light of the public comment period, the FAA's implementing guidance remains in draft form. The agency will refrain from finalizing its implementing guidance until after a final policy is published in a subsequent public notice. As a result, the FAA will not approve any ALPs depicting new residential through-the-fence access points until final guidance

has been issued. The FAA will proceed in a timely manner to address public comments and will not unduly delay final agency action with regard to section 136 of the FMRA.

#### FAA's Interpretation of the FMRA's Section 136

##### *Enforcement*

Section 136 permits sponsors of general aviation airports, as defined by the statute at 49 U.S.C. section 47102(8), to enter into agreements granting through-the-fence access to residential users, but includes specific terms and conditions. The FAA interprets the inclusion of specific terms and conditions as Congress' intent for the FAA to enforce the provision accordingly. Therefore, the FAA will request sponsors with existing residential through-the-fence agreements to demonstrate their compliance with the law. Additionally, the FAA will also request sponsors of general aviation airports proposing to establish new residential through-the-fence agreements to demonstrate that their agreements will comply with the law. Airport sponsors are encouraged to review the FAA's Compliance Guidance Letter on FAA Review of Existing and Proposed Residential Through-Fence-Access Agreements, which will be issued in draft form concurrently with this notice.

Although the law became effective on February 14, 2012, the FAA will afford airport sponsors a grace period for compliance. Airport sponsors with existing residential through-the-fence agreements must provide evidence of compliance not later than September 30, 2013. In most cases, the FAA will define evidence of compliance as the airport sponsor's submission of required documentation. This may include copies of access agreements, deeds, covenants, conditions, and restrictions, etc.



Airport sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements must provide evidence of compliance prior to executing an agreement with a residential user and/or association representing residential users. The establishment of a new residential through-the-fence agreement which does not comply with the law or results in a violation of the sponsor's commitments with the Federal Government may result in enforcement proceedings under 14 Code of Federal Regulations (CFR) part 16.

The FAA acknowledges that its approach to sponsors with existing residential through-the-fence access agreements will be different than the posture to be taken with sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements. This is because airport sponsors with existing agreements may have ceded important rights and powers through the execution of these existing agreements, and their ability to comply with the terms and conditions of the law may be severely hampered. The FAA intends to address such situations on a case-by-case basis, assist these airport sponsors in the development of appropriate mitigations when possible, and report these issues to interested Congressional Committees. Going forward, the FAA expects sponsors of general aviation airports proposing to establish new or add new residential through-the-fence agreements to comply with the terms and conditions of the law. The FAA will not waive these terms and conditions for new agreements.

### *Applicability*

Section 136 applies to sponsors of general aviation airports. The FMRA adopted a definition of "general aviation airport" which is now codified at 49 U.S.C. section 47102(8). A general

aviation airport is defined as a public airport that is located in a State that, as determined by the Secretary, does not have commercial service or has scheduled service with less than 2,500 passenger boardings each year. This definition excludes privately-owned reliever airports. In implementing section 136, the FAA will grandfather the seven privately-owned reliever airports with existing residential through-the-fence access. The owners of these airports will be asked to comply with the law and be treated in a manner similar to general aviation airports as defined in the statute. However going forward, the FAA will apply the statutory prohibition on privately-owned reliever airports and disallow these airports from entering into such agreements. Publically-owned reliever airports are included in the statutory definition of a general aviation airport; sponsors of publically-owned reliever airports will be permitted to enter into residential through-the-fence agreements that comply with the terms and provisions contained in section 136.

The FAA proposes the policy included in this notice to address commercial service airports with existing residential through-the-fence agreements. Commercial service airports which do not currently have residential through-the-fence agreements continue to be prohibited from entering into such agreements by statute.

#### *Terms and Conditions – Commercial Activities*

Section 136 states that residential property owners must maintain their property for residential, noncommercial use for the duration of the agreement. The FAA interprets this as a prohibition on commercial aeronautical services offered by residential through-the-fence users that might compete with on-airport aeronautical service providers, whether existing or not, or chill the

airport sponsor's ability to attract new commercial service providers on the airport. Therefore, in its review of agreements proposing to establish new residential through-the-fence access, the FAA will interpret this condition as a prohibition on commercial *aeronautical* activities only. Agreements which limit the scope of this prohibition to only commercial aeronautical activities will be acceptable. However, the FAA will not concern itself with unrelated commercial activities which may be permitted by local regulation.

The FAA recognizes that some existing residential through-the-fence agreements permit the co-location of homes and aeronautical businesses. In these cases, the FAA will require airport sponsors to execute two separate agreements with the homeowner. One agreement must address the duration, rights, and limitations of the homeowner's residential through-the-fence access, and the second agreement must address the conduct of the commercial aeronautical activity. The second agreement must be consistent with the FAA's current policies on commercial through-the-fence activities and ensure the off-airport business does not result in unjust economic discrimination for on-airport aeronautical service providers. The FAA encourages airport sponsors with these types of mixed-use arrangements to adopt long-term plans to relocate the off-airport commercial aeronautical activity onto the airport when feasible and practicable to do so. Going forward, airport sponsors proposing to establish a residential through-the-fence agreement must meet the statutory terms and conditions, including the prohibition on using the residential property for commercial aeronautical use. Therefore, agreements which propose the co-location or mixed-use of residential and commercial aeronautical activities will be not be consistent with the law.

*Terms and Conditions – Authorized Access*

Section 136 states that residential property owners must prohibit access to the airport from other properties through the property of the property owner with access. The FAA interprets this as a prohibition on unauthorized access to the airport; this condition does not necessarily prescribe a scenario in which all residential through-the-fence users must have their own dedicated access point to enter the airport. The FAA encourages sponsors of general aviation airports proposing to establish new residential through-the-fence agreements to limit the number of access points in a manner that is consistent with airport planning practices. Compliance with this condition will require access agreements stipulate that residential through-the-fence access agreement holders are prohibited from permitting unauthorized users (any individual not party to an access agreement with the airport sponsor) to pass through or “piggy back” on their access in order to enter the airport. The FAA expects airport sponsors to establish their own policies, restrictions, and/or requirements to be imposed on fly-in guests who taxi from the airport property to visit off-airport residents.

*Terms and Conditions – Fueling*

Section 136 states that residential property owners must prohibit any aircraft refueling from occurring on the property with access. The FAA interprets this as a prohibition on the sale of fuel from residential property. The FAA will not concern itself with self-fueling activities which may be permitted by local regulation.

Proposed Final Policy on Existing Through-the-Fence Access to Commercial Service Airports  
from A Residential Property

## Discussion of Revisions to the Interim Policy

In light of section 136 of P.L. 112-95, the FAA proposes the following revisions to the interim policy published on March 18, 2011 (76 FR 54946; September 9, 2010).

### *Proposed Policy*

The law permits sponsors of general aviation airports to enter into residential through-the-fence agreements with property owners or associations representing property owners; however, the law is silent with regard to commercial service airports. The FAA interprets the absence of statutory relief as authority to finalize the interim policy for commercial service airports.

Changes: All references to the policy now clarify that it will be a final measure.

### *Applicability*

The law permits publically-owned general aviation airports, as defined by the statute, to enter into residential through-the-fence agreements that comply with specific terms and conditions. The FAA's proposed policy regarding access to airports from residential property will apply only to those commercial service airports with existing residential through-the-fence access.

Changes: The proposed policy now refers only to commercial service airports with existing residential through-the-fence access.

### *Incorporation of the Law*

The proposed policy has been revised to incorporate the terms and conditions contained in section 136 of P.L. 112-95, as implemented by the FAA. As a result, the FAA will consider the airport sponsor's ability to establish parity in fees between on- and off-airport users as opposed to an airport sponsor's ability to generate revenue to recover airport costs. This reflects Congress' intent that residential through-the-fence users pay airport access charges that are comparable to those tenants and operators on-airport making similar use of the airport.

Changes: Section I, Section II, Section III, and Section IV now state that airport sponsors will be required to satisfy the law. Section II specifies the terms and conditions contained in the law which must also be satisfied by the airport sponsor. References to "ability to generate revenue to recover airport costs" have been replaced with "parity of access fees".

#### *FAA's Standards for Compliance – Recovery of Costs of Operating the Airport*

The law prescribes a single methodology for evaluating fees charged to residential through-the-fence users. Therefore, the FAA will not propose or consider alternative methodologies. The discussion of these methodologies has been replaced with language from the law.

Changes: References to "recovery of costs of operating the airport" have been replaced with "parity of access fees" in Section II. The interim policy's explanation of FAA's standard for compliance, which was the requirement for through-the-fence users to bear a fair proportion of airport costs, has been deleted.

#### *Standards for Compliance at Commercial Service Airports Proposing to Extend Through-the-Fence Access*

Section 136 of P.L. 112-95 prescribes specific terms and conditions to be contained in agreements establishing residential through-the-fence access. The FAA will require commercial service airports proposing to extend or renew their existing agreements to fully comply with these terms and conditions as a supplemental standard applied by the FAA to review these proposals. In addition, because the law requires residential through-the-fence users to pay access charges comparable to on-airport tenants and users making similar use of the airport, the FAA may no longer entertain alternative financial methodologies.

Changes: A bullet stating “the new access agreement fully complies with the terms and conditions contained in section 136 of P.L. 112-95” has been added as a supplemental standard discussed in Section III. The bullet discussing access fees which recover airport costs has been deleted.

#### *Revision of Description of FAA Compliance Guidance Letter*

The FAA anticipates issuing a draft Compliance Guidance Letter on FAA Review of Existing and Proposed Through-the-Fence Access Agreements. This title is slightly different than the title of the Compliance Guidance Letter previously issued on March 21, 2011.

Changes: The title “FAA Implementation and Review of Residential Through-the-Fence Access Arrangements” has been replaced with “FAA Review of Existing and Proposed Through-the-Fence Access Agreements” in Section IV. All references to this Compliance Guidance Letter describe this document as a draft.

#### *Additional Time to Establish Evidence of Compliance and Clarification of Due Date*

The FAA believes all airport sponsors with existing residential through-the-fence access should be afforded additional time to comply with the law. Therefore, the FAA is extending the timeframe for commercial service airports to establish evidence of compliance. All access plans will now be due beginning in Fiscal Year 2014.

Changes: All references to “2013” have been replaced with “2014” in Section IV and Section V. The explanation of the rolling due date contained in the interim policy has been deleted.

#### *Incorporation of Amended Sponsor Assurance 29*

On April 13, 2012, the FAA amended sponsor assurance 29 to require all proposed and existing access points used to taxi aircraft across the airport property boundary be depicted on the ALP (77 FR 22376; April 13, 2012). The FAA is incorporating the amended assurance by clarifying that failure to depict all residential through-the-fence access points is a violation of the sponsor’s grant assurances.

Changes: The phrase “may be considered an apparent violation of the sponsor’s grant assurances” has been replaced with “is a violation of the sponsor’s grant assurances” in Section IV.

#### *Actions Requiring Airport Sponsors to Update the Access Plan*

The FAA believes its description of actions triggering airport sponsors to update its access plan can be better refined. In addition, the FAA believes that the identification of a safety concern should be listed as a new triggering event.



Changes: The FAA proposes to define the actions requiring a commercial service airport sponsor to update its access plan to include development of a master plan or an update to an existing master plan, revisions to an ALP, requests for Federal participation in land acquisition, identification of a safety concern, or substantial changes to the access agreement in Section IV.

#### *Airports Currently in Noncompliance*

The interim policy included language discussing the treatment of airport sponsors currently in noncompliance due to grant assurance violations associated with their residential through-the-fence access agreements. No sponsors of commercial service airports are currently in noncompliance due to grant assurance violations associated with their residential through-the-fence access agreements. Therefore, the FAA proposes to eliminate this paragraph from Section IV and renumber the subsequent paragraphs.

Changes: The paragraph titled “Airports in noncompliance” and designated as paragraph A.5. in Section IV has been deleted. The paragraphs which follow have been renumbered accordingly.

#### *Airports that Do Not Meet the Compliance Standards*

In its interim policy, the FAA proposed to analyze the role played by airports unable to meet the standard of compliance prior to determining the course of action to take. This included determining the role played by the airport in the National Plan of Integrated Airport Systems (NPIAS). Given the more limited applicability of the proposed policy to commercial service airports with existing residential through-the fence access, this analysis is no longer required. The role played by commercial service airports is defined in statute. Instead, the FAA proposes

to consider a commercial service airport sponsor's inability to comply with the law and/or the standards of compliance as a militating factor in the FAA's review of any requests for discretionary AIP funding.

Changes: Subparagraphs (a) and (b) of renumbered Section IV.A.5. have been deleted. The last sentence of paragraph (5) proposes that the FAA may consider a commercial service airport's inability to comply with the law and/or the minimum compliance standards as a militating factor in its review of requests for discretionary funding.

#### PROPOSED FINAL POLICY ON EXISTING THROUGH-THE-FENCE ACCESS FROM A RESIDENTIAL PROPERTY

In consideration of the foregoing, the Federal Aviation Administration proposes the following Policy on existing through-the-fence access to federally-obligated commercial service airports from residential property:

#### **Proposed Final Policy on Existing Through-the-Fence Access to Commercial Service Airports from A Residential Property**

##### *Applicability*

This proposed final Policy applies to commercial service airports with existing residential through-the-fence access.

For the purposes of this proposed final Policy:

In this sense “access” means:

1. An access point for taxiing aircraft across the airport boundary; or
2. The right of the owner of a particular off-airport residential property to use an airport access point to taxi an aircraft between the airport and that property.

“Existing access” through the fence is defined as any through-the-fence access that meets one or more of the following conditions:

1. There was a legal right of access from the property to the airport (e.g., by easement or contract) in existence as of September 9, 2010; or
2. There was development of the property prior to September 9, 2010, in reliance on the airport sponsor’s permission for through-the-fence aircraft access to the airport; or
3. The through-the-fence access is shown on an FAA-approved airport layout plan (ALP) or has otherwise been approved by the FAA in writing, and the owner of the property has used that access prior to September 9, 2010.

“Extend an access” is defined as an airport sponsor’s consent to renew or extend an existing right to access the airport from residential property or property zoned for residential use, for a specific duration of time, not to exceed 20 years.

“Development” is defined as excavation or grading of land needed to construct a residential property; or construction of a residence.

“Residential property” is defined as a piece of real property used for single- or multi-family dwellings; duplexes; apartments; primary or secondary residences even when co-located with a hangar, aeronautical facility, or business; hangars that incorporate living quarters for permanent or long-term use; and time-share hangars with living quarters for variable occupancy of any term.

“Transfer of access” through the fence is defined as one of the following transactions:

1. Sale or transfer of a residential property or property zoned for residential use with existing through-the-fence access; or
2. Subdivision, development, or sale as individual lots of a residential property or property zoned for residential use with existing through-the-fence access.

*I. Existing through-the-fence access from residential property at federally-obligated commercial service airports*

The agency understands that it may not be practical or even possible to terminate through-the-fence access at many of those commercial service airports where that access already exists. Where access could be terminated, property owners have claimed that termination could have substantial adverse effects on their property value and investment, and sponsors seeking to terminate this access could be exposed to costly lawsuits. Accordingly, the FAA will not consider the existence of existing residential through-the-fence access by itself to place a sponsor in noncompliance with its grant assurances at these commercial service airports.

In some cases, the FAA has found that through-the-fence access rights can interfere with the sponsor's ability to meet its obligations as sponsor of a federally assisted public use airport. This is discussed in detail at 75 Fed. Reg. 54946, 54948 (Sept. 9, 2010). As a result, the FAA believes that sponsors of commercial service airports with existing through-the-fence access agreements must adopt measures to substantially mitigate the potential problems with residential through-the-fence access where it exists to avoid future grant compliance issues. Therefore, the FAA, as a condition of continuing grants to commercial service airports with residential through-the-fence access, will require these sponsors adopt measures to substantially mitigate the potential problems with residential through-the-fence access to avoid future grant compliance issues.

Accordingly, the sponsor of a commercial service airport where residential through-the-fence access or access rights already exist will be considered in compliance with its grant assurances if the airport depicts the access on its airport layout plan (ALP), satisfies the terms and conditions

contained in section 136 of P.L. 112-95, and meets certain standards for safety, efficiency, parity of fees, and mitigation of potential noncompatible land uses. Those standards are listed in section II, *Standards for compliance at commercial service airports with existing through-the-fence access*. The FAA's review of those standards will be detailed in a Compliance Guidance Letter which will be issued, in draft form, concurrently and published on the FAA's Web site at [www.faa.gov/airports](http://www.faa.gov/airports). An airport sponsor covered by this proposed final Policy would be required to seek FAA approval before entering into any agreement that would extend (including renewal of access) through-the-fence access. Sponsors are reminded that nearby homeowners possess no right to taxi aircraft across the airport's property boundary, and no off-airport property owner will have standing to file a formal complaint under 14 CFR part 16 with the FAA to challenge the sponsor's decision not to permit such access.

## *II. Standards for compliance at commercial service airports with existing through-the-fence access*

The FAA understands that municipally-owned airports have varying degrees of zoning authority. For example, one sponsor may have strong zoning powers, while another may have none. Also, the nature of existing through-the-fence rights can greatly affect the sponsor's ability to implement measures to control access. Accordingly, the FAA does not expect every sponsor of an airport with existing residential through-the-fence access to adopt a uniform set of rules and measures to mitigate that access. However, the FAA does expect each such sponsor to adopt reasonable rules and implement measures that accomplish the following standards for compliance and satisfy the law, to the fullest extent feasible for that sponsor. In general, the

greater the number of residential through-the-fence access points and users of the airport and the higher the number of aircraft operations, the more important it is to have formal measures in effect to ensure the sponsor retains its proprietary powers and mitigates adverse effects on the airport.

In order to satisfy the law, the sponsor and the property owner or an association representing property owners must have a written agreement that requires the property owner to:

- Pay access charges that the sponsor determines to be comparable to those fees charged to tenants and operators on-airport making similar use of the airport;
- Bear the cost of building and maintaining the infrastructure the sponsor determines is necessary to provide access to the airfield from property located adjacent to or near the airport;
- Maintain the property for residential, noncommercial use (the FAA interprets this limitation as a prohibition on commercial aeronautical services only) for the duration of the agreement;
- Prohibit access to the airport from other properties through the property of the property owner (the FAA interprets this limitation as a prohibition on access to the airport not authorized by the airport sponsor); and
- Prohibit any aircraft refueling from occurring on the property (the FAA interprets this as a prohibition on the sale of fuel from residential property).

The FAA's standards for compliance for any sponsor of a commercial service airport with existing residential through-the-fence access are as follows:

1. *General authority for control of airport land and access.* The sponsor has sufficient control of access points and operations across airport boundaries to maintain safe operations, and to make changes in airport land use to meet future needs.
2. *Safety of airport operations.* By rule, or by agreement with the sponsor, through-the-fence users are obligated to comply with the airport's rules and standards.
3. *Parity of access fees.* The sponsor can and does collect fees from through-the-fence users comparable to those charged to airport tenants.
4. *Protection of airport airspace.* Operations at the airport will not be affected by hangars and residences on the airport boundary, at present or in the future.
5. *Compatible land uses around the airport.* The potential for noncompatible land use adjacent to the airport boundary is minimized consistent with Grant Assurance 21, Compatible Land Use.

These standards will be applied, on a case-by-case basis, in the FAA's evaluation of whether each commercial service airport with existing residential through-the-fence access meets the above requirements to the fullest extent feasible for that airport. In situations when access can be legally transferred from one owner to another without the sponsor's review, the FAA will treat the access as existing. Because the ability of some sponsors to control access has been



compromised as a result of legal rights previously granted to through-the-fence users, existing access locations may be evaluated under the alternative criteria for some standards as indicated below, if applicable to that airport.

In some cases, a sponsor may seek to relocate an existing access point. If the sponsor can demonstrate that this action will improve the airport's overall safety or better address issues associated with the sponsor's long-term planning needs, the FAA will not consider the access rights associated with the replacement access point to extend an access. In order to transfer the terms of the existing access point to a new access point without a change in compliance status, the former existing access point must be removed. Such requests should be coordinated with the FAA Airports District Office (ADO) or Regional Airports Division and clearly depicted on the sponsor's ALP.

### *III. Standards for compliance at commercial service airports proposing to extend through-the-fence access*

Once allowed, residential through-the-fence access is very difficult to change or eliminate in the future. This is because residential owners, more so than commercial interests, typically expect that their residential property will remain suitable for residential use and protected from adverse effects for a long time. Residential buyers and their mortgage lenders may ensure that the property is purchased with rights that guarantee no change in the access to the airport for decades, or indefinitely. Because each additional residential through-the-fence access location introduces the potential for problems for the airport in the future, and because this access is

effectively permanent and resistant to change once permitted, the FAA will review extensions of existing residential through-the-fence access at public use airports carefully.

The following supplemental standards will be applied to the FAA's case-by-case review of sponsors' proposals to extend residential through-the-fence access. In situations when the transfer of access from one owner to another requires the sponsor's concurrence, the FAA will treat the access as an extension. The FAA will not approve requests to extend access that are inconsistent with the sponsor's grant assurances (excluding Grant Assurance 5, Preserving Rights and Powers, paragraph "g" as amended). Furthermore, the sponsor will be required to demonstrate the following standards for compliance:

- The new access agreement fully complies with the terms and conditions contained in section 136 of P.L. 112-95.
- The term of the access does not exceed 20 years.
- The sponsor provides a current (developed or revised within the last five years) airport master plan identifying adequate areas for growth that are not affected by the existence of through-the-fence access rights, or the sponsor has a process for amending or terminating existing through-the-fence access in order to acquire land that may be necessary for expansion of the airport in the future.

- The sponsor will impose and enforce safety and operating rules on through-the-fence residents utilizing this access while on the airport identical to those imposed on airport tenants and transient users.
- Through-the-fence residents utilizing this access will grant the sponsor a perpetual aviation easement for overflight, including unobstructed flight through the airspace necessary for takeoff and landing at the airport.
- Through-the-fence residents utilizing this access, by aviation easement; deed covenants, conditions or restrictions; or other agreement, have acknowledged that the property will be affected by aircraft noise and emissions and that aircraft noise and emissions may change over time.
- Through-the-fence residents utilizing this access have waived any right to bring an action against the sponsor for existing and future operations and activities at the airport associated with aircraft noise and emissions.
- The sponsor has a mechanism for ensuring through-the-fence residents utilizing this access will file FAA Form 7460-1, Notice of Proposed Construction or Alteration, if necessary and complying with the FAA's determination related to the review of Form 7460-1.

- The sponsor has a mechanism for ensuring through-the-fence residents do not create or permit conditions or engage in practices that could result in airport hazards, including wildlife attractants.
- Where available, the sponsor or other local government has in effect measures to limit future use and ownership of the through-the-fence properties to aviation-related uses (in this case, hangar homes), such as through zoning or mandatory deed restrictions. The FAA recognizes this measure may not be available to the sponsor in all states and jurisdictions.
- If the residential community has adopted restrictions on owners for the benefit of the airport (such as a commitment not to complain about aircraft noise), those restrictions are enforceable by the sponsor as a third-party beneficiary, and may not be cancelled without cause by the community association.
- The access agreement is subordinate to the sponsor's current and all future grant assurances.
- The sponsor has developed a process for educating through-the-fence residents about their rights and responsibilities.

#### *IV. Proposed Process and documentation*

A. *Existing residential through-the-fence access.*

1. General. The sponsor of a commercial service airport with existing residential through-the-fence access will be considered in compliance with its grant assurances, and eligible for future grants, if the FAA determines that the sponsor complies with the law and meets the applicable standards listed above under *Standards for compliance at commercial service airports with existing residential through-the-fence access*. The sponsor may demonstrate that it meets these standards by providing the ADO or regional division staff with a written description of the sponsor's authority and the controls in effect at the airport ("residential through-the-fence access plan" or "access plan"). Sponsors are encouraged to review the FAA's draft Compliance Guidance Letter on FAA Review of Existing and Proposed Residential-Through-Fence Access Agreements, which will be issued concurrently with this notice, prior to submitting their access plan. This draft guidance letter may be found on the FAA's Web site at [www.faa.gov/airports](http://www.faa.gov/airports). The ADO or regional division will review each access plan, on a case-by-case basis, to confirm that it addresses how the sponsor complies with the law and meets each of these standards at its airport. The ADO or regional division will forward recommendations regarding each access plan to the Manager of Airport Compliance. Only the Manager of Airport Compliance may accept a commercial service airport sponsor's residential through-the-fence access plan. In reviewing the access plan, the Manager of Airport Compliance may consult with the Transportation Security Administration (TSA). The FAA will take into account the powers of local government in each state, and other particular circumstances at each airport. In every case, however, the access plan must address the law and each of the basic requirements listed under section II of this proposed final Policy.

2. Residential through-the-fence access plan. The FAA will require evidence of compliance before issuing an AIP grant, beginning in Fiscal Year 2014. FY 2014 and later grants will include a special grant condition requiring the ongoing implementation of these access plans. Generally, the FAA will not award discretionary grants to the sponsor until the FAA accepts the sponsor's access plan as meeting the law and the standards to the extent feasible for that airport.
3. Airport Layout Plan. The FAA will require all residential through-the-fence access points to be identified on the airport's layout plan. A temporary designation may be added through a sponsor's pen and ink change to immediately identify the locations on the airport property that serve as points of access for off-airport residents. A formal ALP revision that fully depicts the scope of the existing residential through-the-fence agreements should be completed the next time the sponsor initiates an airport master plan study or update.

A sponsor's failure to depict all residential through-the-fence access points is a violation of the sponsor's grant assurances, and the agency may consider grant enforcement under 14 CFR part 16.

4. FAA review. The FAA's acceptance of the access plan represents an Agency determination that the commercial service airport has met the law and compliance standards for existing residential through-the-fence access for a period not to exceed 20 years. The following actions will trigger a commercial service airport sponsor to update its access plan prior to its 20-year expiration: development of a new master plan or an update to an existing master plan,

significant revisions to an ALP, requests for Federal financial participation in land acquisition, identification of a safety concern, or substantial changes to the access agreement. A commercial service airport sponsor's failure to implement its access plan could result in a violation of the special grant condition and potentially lead to a finding of noncompliance.

5. Commercial Service Airports with existing residential through-the-fence access that do not meet the compliance standards. The FAA recognizes that some commercial service airport sponsors may not be able to fully comply with the law and the standards listed above, due to limits on the powers of the sponsor and/or other local governments, or on other legal limits on the sponsor's discretion to adopt certain measures. Other sponsors have the capability to adopt measures to satisfy the compliance standards but have not done so. The FAA may consider a commercial service airport sponsor's inability to comply with the law and/or the minimum compliance standards as a militating factor in its review of requests for discretionary funding.

6. Commercial service airports that fail to submit an access plan. The FAA expects commercial service airport sponsors with existing residential through-the-fence access to develop an access plan which addresses the law, preserves their proprietary rights and powers, and mitigates the inherent challenges posed by this practice. Beginning in Fiscal Year 2014, a sponsor's failure to comply with the Policy may jeopardize its ability to compete for AIP grant funding.

*B. Requests to extend residential through-the-fence access at airports covered by this proposed final Policy*

As of the date of the enactment of Public Law 112-95 (February 14, 2012), a sponsor of a commercial service airport proposing to extend an access agreement must submit a current airport master plan and a revised residential through-the-fence access plan as detailed below.

The ADO or regional division will forward its recommendations regarding each request to extend access to the Manager of Airport Compliance. Only the Manager of Airport Compliance may approve a sponsor's request to extend access. In reviewing the proposal, the Manager of Airport Compliance may consult with the TSA.

1. Master Plan. A sponsor of a commercial service airport wishing to extend an existing residential through-the-fence access agreement must submit a recent airport master plan to the ADO or regional division. The FAA considers a master plan to be recent if it was developed or updated within the past five years. The master plan should explain how the sponsor plans to address future growth, development, and use of the airport property over the next 20 years; sponsors should work with ADO or regional division staff to develop an appropriate scope of work for these master plans.

2. Residential through-the-fence access plan. The sponsor is responsible for revising its access plan, as discussed under section IV.A.2 of this proposed final Policy, to reflect how it will meet the standards for compliance for the extended access. Once the FAA has accepted the revised access plan, the FAA will condition future AIP grants upon its ongoing implementation.



3. Continuing obligations. Once the revised access plan is accepted by the FAA, and if required, the revised ALP, is approved by the FAA, the sponsor must continue to comply with obligations described in section IV.A of this proposed final Policy.

#### *V. Eligibility for AIP grants*

A. General. Beginning in Fiscal Year 2014, a sponsor of a commercial service airport with existing residential through-the-fence access will be required to submit their residential through-the-fence access plan prior to notifying the FAA of its intent to apply for an AIP grant. The sponsor will not lose eligibility for entitlement grants on the basis of the through-the-fence access, but the FAA will consider the potential constraints on the utility of the airport to be a significant factor in future AIP funding decisions.

B. Public infrastructure and facilities with substantial benefit to private through-the-fence users. The FAA may be unable to justify the federal investment in a proposed project when private residential developments with through-the-fence access will receive substantial value from that federally assisted airport infrastructure and/or facility.

C. Exclusive or primary private benefit. On-airport infrastructure and facilities used exclusively or primarily for accommodation of through-the-fence users are considered private-use and are ineligible for AIP grants.

Issued in Washington, DC on July 18, 2012.

Randall S. Fiertz,

Director, Airport Compliance and Management Analysis.

[FR Doc. 2012-18058 Filed 07/27/2012 at 8:45 am; Publication Date: 07/30/2012]